53D GRADUATE COURSE

THE GENERAL ARTICLES

TABLE OF CONTENTS

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THE GENERAL ARTICLES

OUTLINE OF INSTRUCTION

I. INTRODUCTION.

A. History.

"All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the above articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion."

AMERICAN ARTICLES OF WAR OF 1776, §XVIII, art. 5, reprinted in William Winthrop, MILITARY LAW AND PRECEDENTS 971 (2d rev. ed. 1920).

B. "Enumerated" Article 134 Offenses. MCM, pt. IV, ¶¶ 61-113.

1. Nonexhaustive list. Other offenses may be charged, provided the alleged misconduct satisfies one of the three clauses of article 134, and the misconduct cannot be prosecuted under another article of the UCMJ. *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978).

2. Proof and Pleading. The "enumerated" Article 134 offenses require proof of the misconduct's prejudice to good order and discipline *or* its tendency to bring discredit upon the armed forces. There is no requirement to plead these elements. See the model specifications at MCM, pt. IV, ¶¶ 61-113.

II. THE GENERAL ARTICLE. UCMJ ARTICLE 134.

A. Theories for Criminal Liability.

1. Conduct prejudicial to good order and discipline [Clause 1].

2. Conduct of a nature to bring discredit upon the armed forces [Clause 2].

3. Conduct constituting a non-capital crime not punishable under another article of the UCMJ [Clause 3].

B. Fair Notice.

1. Due Process notice of criminal sanction. The Fifth Amendment requires that a person have "fair notice" that an act is criminal before being prosecuted for that act. Potential sources of this notice include: federal law, state law, military case law, military custom and usage and military regulations. *United States v. Vaughan*, 58 M.J. 29, 31-32 (2003); *United States v. Saunders*, 59 M.J. 1 (2003) (holding the existence of federal and state anti-stalking statutes provided sufficient notice to accused convicted of "harassment" under UCMJ art. 134, Clause 2).

2. "General notice" of elements in the specification. A person must also have "fair notice as to the standard applicable to the forbidden conduct" against which he must defend. *Vaughan*, 58 M.J. at 31, citing *Parker v. Levy*, 417 U.S. 733, 755 (1974); *Sanders*, 59 M.J. at 9 (holding a specification patterned after a Georgia statute provided the accused with adequate notice of the elements of "harassment" charged under Article 134, Clause 2).

C. Elements. MCM, pt. IV, ¶60b.

1. Depend upon the nature of the charged offense.

a. For Clause 1 or Clause 2 offenses, the evidence must prove the following elements:

(1) That the accused did or failed to do certain acts; and

(2) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

b. For Clause 3 offenses, the evidence must prove every element of the incorporated or assimilated offense.

D. Conduct Prejudicial to Good Order and Discipline (Clause 1).

1. Not every irregular, mischievous, or improper act is a court-martial offense. MCM, pt. IV, ¶60b(2)(c).

2. Conduct must be directly and palpably prejudicial to good order and discipline. *United States v. Sadinsky*, 34 C.M.R. 343 (C.M.A. 1964).

3. A breach of military custom may result in a Clause 1 offense. MCM, pt. IV, ¶60c(2)(b). To serve as the basis of an Article 134 offense, the custom must satisfy the following requirements:

   a. Long established practice;

   b. Common usage attaining the force of law;

   c. Not contrary to military law; and

   d. Ceases when observance has been abandoned.

   United States v. Smart, 12 C.M.R. 826 (A.F.B.R. 1953).

4. Applications.

   a. Cross-dressing. *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988) (on-post); *United States v. Guerrero*, 33 M.J. 295 (C.M.A. 1991) (off-post), *cert. denied*, 502 U.S. 1096 (1992).

   b. Displaying images depicting bestiality to subordinates while on duty. *United States v. Farence*, 57 M.J. 674 (C.G. Ct. Crim. App. 2002), *pet. denied*, 58 M.J. 203 (2003).

   c. Possession of child pornography. *United States v. Mason*, 60 M.J. 15 (2004) (may be prejudicial to good order and discipline regardless of whether images are "virtual" and thus constitutionally protected from prosecution under civilian criminal law).

   d. Being naked in a subordinate NCO's bedroom with that NCO's partially clad wife. *United States v. Diggs*, 52 M.J. 251 (2000).

   e. Wrongfully inhaling chemical fumes. *United States v. Glover*, 50 M.J. 476 (1999) (inhaling Dust-Off, a cleaning product that contained chlorodifluoromethane and difluromethane).

   f. "Mooning" under circumstances prejudicial to good order and discipline. *United States v. Choate*, 32 M.J. 423 (C.M.A. 1991).

g. Self-injury without the intent to avoid service. *United States v. Ramsey*, 40 M.J. 71 (C.M.A. 1994) (enumerated at MCM, pt. IV, ¶103a in 1995).

h. Unprotected sexual intercourse while HIV-positive. *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989) (enumerated in 1999 at MCM, pt. IV, ¶100a as reckless endangerment).

i. Setting off false fire alarm and writing on the doors of a dormitory. *United States v. Koop*, 9 M.J. 564 (A.F.C.M.R. 1980).

j. Being a "Peeping Tom" in a women's latrine. *United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978).

E. Conduct of a Nature to Bring Discredit upon the Armed Forces (Clause 2).

1. Conduct must have the tendency to bring the service into disrepute or to lower the service in public esteem. MCM, pt. IV, ¶60c(3); *see United States v. Saunders*, 59 M.J. 1 (2003).

2. Wholly private conduct is generally not reached by Article 134; however, "open and notorious" conduct may be service-discrediting. *United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986); *United States v. Berry*, 20 C.M.R. 325 (C.M.A. 1956) (multiple sexual partners in a single hotel room; parties knew others were present).

3. Public knowledge of military status and conduct.

a. Conduct may be service discrediting where civilians are aware of both the military status of the offender and the discrediting behavior. *United States v. Lowe*, 16 C.M.R. 228 (C.M.A. 1954) (drunkenness in the presence of citizens of a foreign country is discrediting to the service).

b. Knowledge required? *United States v. Perez*, 33 M.J. 1050 (A.C.M.R. 1991) (some civilian must be aware of the behavior and the military status of the offender); *cf. United States v. Green*, 39 M.J. 606 (A.C.M.R. 1994) (no evidence that adultery in the barracks was service-discrediting, in violation of local civil law or community standards). *But see United States v. Nygren*, 53 M.J. 716 (C.G. Ct. Crim. App. 2000) (Clause 2 covers "all conduct of a *nature* to bring discredit upon the armed forces. . . which *has a tendency* to bring the service into disrepute or which *tends* to lower it in public esteem.").

4. Violation of state or foreign law is not *per se* service discrediting. *United States v. Sadler*, 29 M.J. 370 (C.M.A. 1990).

5. Applications.

a. "Open and notorious" sexual activities.

(1) It is not necessary that a third person actually observe the act, but only that it is reasonably likely that a third person would perceive it, considering the location of the act itself, and the attendant circumstances surrounding its commission. *See United States v. Izquierdo*, 51 M.J. 421 (1999) (intercourse in a barracks room with two roommates in the room, even though the accused hung a sheet that substantially blocked roommates' side of room).

(2) *United States v. Sims*, 57 M.J. 419 (2002) (not open and notorious when appellant was in his unlocked private dorm room, with a greater expectation of privacy than a shared barracks room, and neither party had disrobed); *United States v. Carr*, 28 M.J. 661 (N.M.C.M.R. 1989) (intercourse on a public beach at night not likely to be seen).

(3) *United States v. Sanchez*, 29 C.M.R. 32 (C.M.A. 1960).

b. False public speech about military service. *United States v. Stone*, 40 M.J. 420 (C.M.A. 1994).

c. Non-consensual, obscene phone calls. *United States v. Sullivan*, 42 M.J. 360 (1995) (asking strangers intimate questions about their sexual activities under the pretense of conducting a survey).

d. Resisting arrest / flight from apprehension by non-military authorities. *United States v. Seymore*, 19 M.J. , 608 (A.C.M.R. 1984) (foreign police); *United States v. Williams*, 26 M.J. 606 (A.C.M.R. 1988) (post exchange detective).

e. Possession of child pornography. *United States v. Mason*, 60 M.J. 15 (2004) (may be service-discrediting regardless of whether images are "virtual" and thus constitutionally protected from prosecution under civilian criminal law).

f. Child Neglect. *United States v. Vaughan*, 58 M.J. 29 (2003) (leaving an infant unattended overnight).

g. Harassment / Stalking. *United States v. Saunders*, 59 M.J. 1 (2003) (pattern of harassing phone call and visits to ex-fiancée in Germany).

F. Crimes and Offenses Not Capital (Clause 3).

1. Violation of a non-capital federal criminal statute.

a. Jurisdiction. The offense must occur in a place where the law in question applies. MCM, pt. IV, & 60c(4)(c)(i). S*ee, e.g.*, *United States v. Martens*, 59 M.J. 501 (A.F. Ct. Crim. App 2003); *United States v. Cream*, 58 M.J. 750 (N.M. Ct. Crim. App. 2003) (holding Rota Naval Station was within the statute's definition of "Federal territory").

b. Attempts. A service member can be convicted of an attempt to commit a federal offense under Clause 3, even if the underlying federal statute has no attempt provision. *United States v. Craig*, 19 M.J. 166 (C.M.A. 1985).

c. Proof. Elements of the federal statute are controlling. *United States v. Ridgeway*, 13 M.J. 742 (A.C.M.R. 1982).

d. Lesser-included offenses. A specification containing allegations of fact insufficient to establish a violation of a designated federal statute may nonetheless be sufficient to constitute a violation of either Clause 1 or 2, Article 134. *United States v. Sapp*, 52 M.J. 90 (2000); *United States v. Augustine*, 52 M.J. 95 (2000); *United States v. Mayo*, 12 M.J. 286 (C.M.A. 1982). *See also United States v. Gould*, 13 M.J. 734 (A.C.M.R. 1982).

2. Applications

a. Threat against the President: 18 U.S.C. §87. *United States v. Ogren*, 54 M.J. 481 (2001) (threat made while in pretrial confinement for unrelated charges: "I'm going to find Clinton and blow his [expletive] brains out").

b. Child pornography: 1996 Child Pornography Prevention Act (CPPA), 8 U.S.C. §§ 2252A.

(1) *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002). The definition of "child pornography" in the CPPA was overbroad in violation of the First Amendment's protection of free speech. Specifically, the "virtual" image prohibitions defined in 18 U.S.C. §§ 2256(8)(B) and 2256(8)(D) swept too broadly by prohibiting non-obscene sexually explicit depictions created without actually victimizing minors.

(2) *United States v. O'Connor*, 58 M.J. 450 (2003) (holding guilty plea to violation of the CPPA not provident, because the record was unclear whether accused was pleading guilty to possession of virtual or actual child pornography; could not be upheld as a provident plea to Clause 2, because there was no discussion of service-discrediting character during the providence inquiry).

(3) *United States v. Tynes*, 58 M.J. 704 (Army Ct. Crim. App. 2003) (holding that the instructions negated any possibility that the convictions were based on unconstitutional portions of the CPPA; contains a pattern instruction for child pornography cases), *review granted*, 2004 CAAF LEXIS 910 (Sept. 9, 2004).

(4) *United States v. Mason*, 60 M.J. 15 (2004) (holding accused's improvident plea to violation of the CPPA was provident to Clause 1 or 2 offense).

c. Federal Assimilative Crimes Act (FACA): 18 U.S.C. §13.

(1) Adopts un-preempted state offenses as the local federal law of application.

(2) The purpose of FACA is to fill the gaps left by the patchwork of federal statutes. *United States v. Picotte*, 30 C.M.R. 196 (C.M.A. 1961).

(3) "Offenses" may include any non-regulatory statutory prohibition that provides for some form of punishment if violated. *United States v. White*, 39 M.J. 796 (N.M.C.M.R. 1994) (assimilating provisions of state motor vehicle code denominated as "violations" rather than "crimes", but which provide for penal sanctions). *But cf. United States v. Clinkenbeard*, 44 M.J. 577 (A.F. Ct. Crim. App. 1996)(reaching contrary result).

(4) Applies state law whether enacted before or after passage of the FACA. *United States v. Rowe*, 32 C.M.R. 302 (C.M.A. 1962).

(5) The FACA may not be used to extend or narrow the scope of existing federal criminal law. *Lewis v. United States*, 118 S.Ct. 1135 (1998); *United States v. Perkins*, 6 M.J. 602 (A.C.M.R. 1978).

(6) Jurisdiction.

(a) The government must establish exclusive or concurrent federal jurisdiction before the FACA is applicable. *See United States v. Dallman*, 34 M.J. 274 (C.M.A. 1992).

(b) A guilty plea may be sufficient to establish jurisdiction required by the FACA. *United States v. Kline*, 21 M.J. 366 (C.M.A. 1986); *United States v. Jones*, 34 M.J. 270 (C.M.A. 1992).

G. Limitations on the Use of Article 134.

1. The Preemption Doctrine.

a. Article 134 cannot be used to prohibit conduct "specifically mentioned" by Congress in UCMJ arts. 78 and 80-132. MCM, pt. IV, ¶60c(5)(a).

b. Under the test provided in *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978), conduct is "specifically mentioned" if:

(1) Congress intended to limit prosecutions for certain conduct to offenses defined in specific articles of the UCMJ; and

(2) The offense sought to be charged is composed of a residuum of elements of an enumerated offense under the UCMJ.

c. For preemption to apply, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way. *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979).

d. FACA "preemption." As addressed above, the Federal Assimilative Crimes Act (FACA), 18 U.S.C. §13, permits the adoption of state offenses as the local federal law of application. Such crimes are charged as violations of Article 134, Clause 3. Whether the state law may be assimilated is governed by a two-part test:

(a) Is the accused's "act or omission . . . made punishable by any enactment of Congress"? If not, then assimilate. If so, then ask the next question.

(b) Do the relevant federal statutes preclude application of the state law, for example, because its application would interfere with the achievement of a federal policy, effectively rewrite an offense definition that Congress carefully considered, or because the federal statutes reveal an intent to occupy the entire field of misconduct under consideration? (*i.e.*, Is there evidence of Congress's intent to permit or deny assimilation?)

Lewis v. United States, 118 S.Ct. 1135 (1998).

e. Applications.

(1) Prosecution under 18 U.S.C. § 842(h) for possession of stolen explosives is not preempted. *United States v. Canatelli*, 5 M.J. 838 (A.C.M.R. 1978).

(2) State statute prohibiting wrongfully eluding a police officer is not preempted. *United States v. Kline*, 21 M.J. 366 (C.M.A. 1986).

(3) State auto burglary statute is not preempted. *United States v. Sellars*, 5 M.J. 814 (A.C.M.R. 1978).

(4) State statute prohibiting hunting at night is not preempted. *United States v. Fishel*, 12 M.J. 602 (A.C.M.R. 1981).

(5) State child abuse statute is not preempted per se; however, evidence established no more than assault under Article 128. *United States v. Irvin*, 21 M.J. 184 (C.M.A. 1985), cert. denied, 479 U.S. 852 (1986); see also *United States v. Wallace*, 49 M.J. 292 (1998).

(6) State statute prohibiting false reports of crimes is preempted. *United States v. Jones*, 5 M.J. 579 (A.C.M.R. 1978).

(7) Prosecution of cable television fraud using Hawaii statute is preempted by an applicable federal statute on cable television fraud, 47 U.S.C. § 553(a) & (b). *United States v. Mitchell*, 36 M.J. 882 (N.M.C.M.R. 1993).

(8) State statute prohibiting the unlawful termination of a pregnancy is not preempted by Articles 118 and 119. *United States v. Robbins*, 52 M.J. 159 (1999). *But see* UCMJ art. 119a (LEXIS 2004) (creating death or injury of an unborn child as an offense).

2. The Capital Crime exception. MCM, pt. IV, ¶60c(5)(b).

a. Capital crimes are those crimes made punishable by death under the common law or by statute of the United States.

b. Capital crimes may not be tried under Article 134. *See United States v. French*, 27 C.M.R. 245 (C.M.A. 1959).

H. Pleading Considerations.

1. Generally. Offenses arising under Article 134 that are either analogous to, or lesser-included offenses of, other offenses arising under the enumerated articles of the UCMJ should be pled separately; the trier of fact should be instructed that the accused could not, however, be convicted of both. *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994).

2. Clauses 1 and 2.

a. Use the form specification if the alleged misconduct falls under any offense listed in MCM, pt. IV, ¶¶61-113.

b. Drafting a specification for unenumerated misconduct:

(1) Identify and expressly plead the elements of the offense. The MCM provides that there are only two elements for Clause 1 and 2 offenses: act or omission by accused, and prejudicial or discrediting effect. MCM, pt. IV, ¶60b.

(2) Notice pleading is the rule. Describe the offense with sufficient specificity to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused from subsequent reprosecution for the same offense. Allege in the specification only those facts that make the accused's conduct a crime. *See* Appendix A below.

(3) Generally, no specific allegation is required that the conduct at issue is a disorder or neglect. MCM, pt. IV, ¶60c(6)(a); *United States v. Williams*, 24 C.M.R. 135 (C.M.A. 1957).

(4) Words of criminality. If the act alleged is not *inherently* criminal, but is made an offense only by operation of custom, statute, or regulation, the specification must include words of criminality appropriate to the facts of the case, e.g., "without authority," "wrongfully," or "unlawfully." *See* R.C.M. 307(c)(3) discussion.

(5) However, when drafting novel specifications, it may be necessary to allege wrongfulness of the act if it would be otherwise innocent conduct. *United States v. Regan*, 11 M.J. 745 (A.C.M.R. 1981) (dismissing specification for failure to state an offense that alleged that the accused "threw butter on the ceiling in the dining facility").

3. Clause 3.

a. Identify the federal or assimilated state statute. MCM, pt. IV, ¶60c(6)(b).

b. Consult civilian case law or pattern jury instructions. Each element of the federal or assimilated state statute must be alleged expressly or by necessary implication. MCM, pt. IV, ¶60c(6)(b).

c. Sample specifications. *See* Appendix B.

I. Punishment.

1. For the offenses listed in MCM, pt. IV, ¶¶61-113, the specified punishments control. R.C.M. 1003(c)(1)(A).

2. For other offenses, the following rules apply:

a. If the offense is either included in, or closely related to, an offense listed in ¶¶61-113, then the penalty provided in the MCM for the listed offense applies. *United States v. Sellars*, 5 M.J. 814 (A.C.M.R. 1978) (state auto burglary statute was closely related to article 130 housebreaking and should therefore be punished consistent with article 130 punishments); R.C.M. 1003(c)(1)(B)(i).

b. If an unlisted offense is included in a listed crime and is closely related to another, or it is equally related to two or more listed offenses, the lesser punishment of the related crimes shall apply. R.C.M. 1003(c)(1)(B)(i).

c. If the punishment for an unlisted offense cannot be determined by applying the above tests, then the punishment is that provided by the civilian statute or as authorized by the custom of the service. R.C.M. 1003(c)(1)(B)(ii).

(1) Prosecution under 18 U.S.C. § 842(h) for possession of stolen explosives is punished under penalties provided in the federal statute. *United States v. Canatelli*, 5 M.J. 838 (A.C.M.R. 1978).

(2) Prosecution under 4 U.S.C. § 3 for wrongfully and dishonorably defiling the American flag is punished under the penalties provided in the statute. *United States v. Cramer*, 24 C.M.R. 31 (C.M.A. 1957).

(3) When a state statute is assimilated, its penalty is also assimilated. *United States v. Picotte*, 30 C.M.R. 196 (C.M.A. 1961).

III. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN. UCMJ ARTICLE 133.

A. Elements. MCM, pt. IV, ¶59b.

1. The accused did or omitted to do certain acts; and

2. Under the circumstances, these acts or omissions constituted conduct unbecoming an officer and a gentleman.

B. Class of Potential Offenders.

1. "Gentleman" includes both male and female offenders. MCM, pt. IV, ¶59c(1). *See, e.g., United States v. Norvell*, 26 M.J. 477 (C.M.A. 1988).

2. Commissioned officers, cadets, and midshipmen. UCMJ art. 133.

a. "Commissioned officer" includes commissioned warrant officers. *See United States v. Beckermann*, 35 M.J. 842 (C.G.C.M.R. 1992).

b. "Cadet" means a cadet of the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy. "Midshipman" means a midshipman of the United States Naval Academy and any other midshipman on active duty in the naval service. UCMJ art. 1.

C. "Unbecoming" Conduct.

1. Includes conduct that dishonors, disgraces or seriously compromises the offender professionally and/or personally. MCM, pt. IV, ¶59c(2); *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987); *United States v. Schumacher*, 11 M.J. 612 (A.C.M.R. 1981).

2. Merely failing to meet the standards expected of an ideal officer does not amount to an Article 133 violation. MCM, pt. IV, ¶59c(2). It is reserved for "serious delicts of officers." *United States v. Wolfson*, 36 C.M.R. 722 (A.B.R. 1966). The offender's dishonor or disgrace must be severe. *See United States v. Giordano*, 35 C.M.R. 135 (C.M.A. 1964). The misconduct "must be so disgraceful as to render an officer unfit for service." *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988).

3. Article 133 is not unconstitutionally void for vagueness, in part due to this rigorous standard. *See Parker v. Levy*, 417 U.S. 733, 753 (1974) (act "must so offend so seriously against law, justice, morality, or decorum as to expose to disregard, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents").

4. The offender may be acting in either a personal or professional capacity. *See, e.g., United States v. Bonar*, 40 C.M.R. 482 (A.B.R. 1969) (essentially personal conduct--driving private automobile in violation of a state judge's order); *United States v. Gunnels*, 21 C.M.R. 925 (A.B.R. 1956) (essentially professional conduct--accepting money from an enlisted member to procure a discharge).

5. Opinion testimony from witnesses regarding whether the accused's conduct is unbecoming an officer and a gentleman is received at trial and considered by the appellate court. *United States v. Lewis*, 28 M.J. 179 (C.M.A. 1989); *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988).

6. A violation of Article 133 is not predicated upon violation of another article of the UCMJ.

   a. Offender can violate Article 133 without violating another punitive article. *United States v. Taylor*, 23 M.J. 314 (C.M.A. 1987) (affirming conviction for conduct not amounting to a solicitation to commit larceny); *United States v. Lewis*, 28 M.J. 179 (C.M.A. 1989) (charging fellow officer $2000.00 for tutoring in platoon leader skills); *United States v. Bilby*, 39 M.J. 467 (C.M.A. 1994), *cert. denied*, 115 S. Ct. 724 (1995) (solicitation to violate arguably unconstitutional statute was unbecoming conduct).

   b. Offender can violate another punitive article without violating Article 133. *United States v. Sheehan*, 15 M.J. 724, 727 (A.C.M.R. 1983) (two-day AWOL from administrative duties during peacetime does not amount to an Article 133 violation); *United States v. Clark*, 15 M.J. 594 (A.C.M.R. 1983) (failure to go to PT formation, based upon arriving 15 minutes late, although a violation of Article 86, did not constitute an Article 133 offense).

D. Applications.

1. Financial Irregularities.

   a. Loaning money to subordinates and charging usurious interest rates. *United States v. Giordano*, 35 C.M.R. 135 (C.M.A. 1964). *Cf. United States v. Smith*, 16 M.J. 694 (A.F.C.M.R. 1983) (merely borrowing money from a subordinate may not constitute a violation of Article 133).

b. Charging a fellow officer "tuition" for tutoring in officer skills. *United States v. Lewis*, 28 M.J. 179 (C.M.A. 1989)

c. Wrongfully failing to pay a just debt. *United States v. Brunson*, 30 M.J. 766 (A.C.M.R. 1990).

d. Negligently writing 76 dishonored checks. *United States v. Jenkins*, 39 M.J. 843 (A.C.M.R. 1994).

2. Honesty/Integrity.

a. Perjury at a state criminal trial. *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993).

b. Dishonorable catheterization to avoid giving a valid urine sample. *United States v. Norvell*, 26 M.J. 477 (C.M.A. 1988).

c. Forging false PCS orders. *United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984).

d. Lying to a superior to get a pass. *United States v. Sheehan*, 15 M.J. 724 (A.C.M.R. 1983).

e. Violation of a state judge's order. *United States v. Bonar*, 40 C.M.R. 482 (A.B.R. 1969).

f. Public association with person known by accused to be drug smuggler. *United States v. Maderia*, 38 M.J. 494 (C.M.A. 1994).

3. Indecent/Immoral Conduct.

a. Sexual intercourse with a subordinate during duty hours. *United States v. Jefferson*, 21 M.J. 203 (C.M.A. 1986) (per curiam); *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986) (off-duty, on-post intercourse).

b. Sexual exploitation of a civilian waitress under the accused's supervision. *United States v. Shober*, 26 M.J. 501 (A.F.C.M.R. 1986).

c. Mailing a sexually suggestive letter to a 14-year old student in response to her letter written as part of a public support campaign during Operation DESERT STORM. *United States v. Hartwig*, 39 M.J. 125 (C.M.A. 1994).

d. Indecent language may be unbecoming conduct even when uttered in "private." *United States v. Moore*, 38 M.J. 490 (C.M.A. 1994).

e. Marital misconduct. *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993) (adultery); *United States v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993) (deceitful orchestration of divorce), *aff'd*, 42 M.J. 168 (1995).

f. Cross-dressing at off-post bar frequented by homosexuals. *United States v. Modesto*, 39 M.J. 1055 (A.C.M.R. 1994), *aff'd*, 43 M.J. 315 (1995).

4. Misconduct with enlisted members / subordinates.

a. Obtaining $200 from an enlisted member to procure a discharge. *United States v. Gunnels*, 21 C.M.R. 925 (A.B.R. 1956).

b. Smoking marijuana with enlisted members. *United States v. Graham*, 9 M.J. 556 (N.C.M.R. 1980); *see United States v. Newak*, 25 M.J. 564 (A.F.C.M.R. 1987), *aff'd*, 29 M.J. 304 (C.M.A. 1989).

c. Consensual sodomy with enlisted members off post. *United States v. Coronado*, 11 M.J. 522 (A.F.C.M.R. 1981).

d. Sexual intercourse with subordinate commissioned officer while other military personnel were present in the same house. *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986).

e. Conviction reversed where accused officer visited legal brothels with enlisted soldiers, where the accused did not participate in, or seek to participate in, sexual activities. *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988).

f. Attempting to use subordinates to get a date for the accused with another subordinate. *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987).

g. Communicating a procedure for concealing marijuana use by catheterization and admitting personal use of the procedure to an enlisted subordinate. *United States v. Norvell*, 26 M.J. 477 (C.M.A. 1988).

E. Pleadings.

1. When an offense alleged to violate UCMJ art. 133 is the same as another offense set forth in the MCM, the elements for the former offense are the same as those set forth for the specific offense, with the additional requirement that the act or omission is conduct unbecoming an officer and gentleman. MCM, pt. IV, ¶59c(2).

2. Failing to allege that the act was dishonorable or the conduct was unbecoming an officer and a gentleman is not necessarily fatal. *United States v. Wilson*, 14 M.J. 680 (A.F.C.M.R. 1982).

3. Lesser-included offenses.

a. Where the underlying acts of misconduct are the same, a service disorder or discredit under Article 134 is a lesser-included offense of Article 133. *United States v. Cherukuri*, 53 M.J. 68 (2000) (holding four specifications of indecent assault were multiplicious with specification of conduct unbecoming an officer by abusing position as a medical doctor to indecently assault four women); *United States v. Rodriquez*, 18 M.J. 363 (C.M.A. 1984).

b. Where the underlying act of misconduct is the same, larceny under Article 121 is a lesser-included offense of Article 133. *United States v. Frelix-Vann*, 55 M.J. 329 (2001) (officer pled guilty to one specification of conduct unbecoming and one specification of larceny for stealing a package of dog bones, a "Die Hard with Vengence" video cassette, an "Alien Nation" video cassette, a "Predator 2" video cassette, a "New Edition" compact disc, and an "LL Cool J" compact disc). *See also United States v. Palagar*, 56 M.J. 294 (2002) (larceny and conduct unbecoming multiplicious where unauthorized purchases with government credit card constituted same underlying misconduct for both offenses).

4. Allegations of "undue familiarity" and "excessive social contacts" with married female service members were insufficient to allege unbecoming conduct. *United States v. Kroop*, 38 M.J. 470 (C.M.A. 1993). *But see United States v. Boyett*, 42 M.J. 150 (1995) (affirming conviction for unprofessional close personal relationship, including sexual intercourse, with enlisted person not under accused's supervision); *United States v. Rogers*, 54 M.J. 244 (2001) (holding specification stating USAF LTC had "unprofessional relationship" with LT in his command stated an offense).

F. Referral Decision.

1. Commissioned officers have traditionally been held to a higher standard of conduct than enlisted members or civilians. *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987); *United States v. Court*, 24 M.J. 11, 17 n.2 (C.M.A. 1987) (Cox, J., concurring).

2. The convening authority may take officer's commissioned status into account in making the referral decision. *United States v. Means*, 10 M.J. 162 (C.M.A. 1981).

3. Opinion testimony from witnesses regarding whether the accused's conduct is unbecoming an officer and a gentleman is received at trial and considered by the appellate court. *United States v. Lewis*, 28 M.J. 179 (C.M.A. 1989); *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988).

G. Punishment.

1. Maximum punishment is a dismissal, forfeiture of all pay and allowances, and confinement for a period not in excess of that authorized for most analogous offense for which a punishment is prescribed by the MCM, or, if none is prescribed, for one year. MCM, pt. IV, ¶59e.

2. The maximum sentence that may be adjudged for a duplicitously pled specification under Article 133 will be that imposable for "the most analogous offense" with the greatest maximum punishment. *United States v. Hart*, 32 M.J. 101 (C.M.A. 1991).

APPENDIX A: LEGALLY SUFFICIENT SPECIFICATIONS

I. The Test. *United States v. Sell*, 11 C.M.R. 202 (C.M.A 1953). A legally sufficient specification must:

A. Allege all the elements of the offense,

B. Provide notice to the accused of the offense against which he must defend, and

C. Give sufficient facts to protect against re-prosecution.

II. Alleging the Elements.

A. Every element must be alleged either *directly* or by *fair implication*.

B. Applications.

1. *United States v. Brown*, 42 C.M.R. 656 (A.C.M.R. 1970) ("club" alleges, by fair implication, a building or structure as required for housebreaking).

2. *United States v. Knight*, 15 M.J. 202 (C.M.A. 1983) ("burglariously" enter does not allege, by fair implication, the element of breaking and entering required for burglary).

C. Omissions.

1. Traditional, formal analysis. *United States v. Brice*, 38 C.M.R. 134 (C.M.A. 1967) ("wrongfully" omitted from possession spec; fatal defect).

2. "Guilty plea" or "greater tolerance" test. *United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986) ("without authority" omitted from AWOL spec., was not fatal; flawed specifications first challenged on appeal are viewed with greater tolerance). *Watkins* "greater tolerance" test applies when:

a) The specification could reasonably be construed to charge a crime;

b) The specification is not challenged at trial;

c) The accused pleads guilty; and

d) No prejudice is shown.

3. Applications.

a) Omitting "knowledge." *United States v. Brown*, 25 M.J. 793 (N.M.C.M.R. 1987) (having "knowledge of" a lawful order omitted; fatal omission, prejudicial).

b) Omitting "wrongful" - *Brice* revisited. *United States v. Brecheen*, 27 M.J. 67 (C.M.A. 1988) ("wrongful" omitted from both conspiracy to distribute specs in guilty plea case; not fatal); *see also United States v. Woods*, 28 M.J. 318 (C.M.A. 1989) (failure to allege traditional words of criminality in a UCMJ art. 134, clause I spec not fatal).

c) Omitting "wrongful." *United States v. Simpson*, 25 M.J. 865 (A.C.M.R. 1988) ("wrongful" omitted from one of four distribution specs; not fatal, because fairly implied from other specifications).

d) Omitting "sexual intent." *United States v. LeProwse*, 26 M.J. 652 (A.C.M.R. 1988) ("with intent to arouse sexual desires" omitted; alleged by fair implication).

e) Omitting "wrongful" in a contested case. *United States v. Bryant*, 28 M.J. 504 (A.C.M.R. 1989) ("wrongful" omitted from conspiracy to distribute spec in a contested case; fairly implied from separate distribution spec); *see also United States v. Woods*, 28 M.J. 318 (C.M.A. 1989) (words of criminality omitted from Art. 134 specification alleging reckless endangerment for AIDS-related misconduct; specification adequate).

III. Notice and Protection from Re-prosecution.

A. *United States v. Curtiss*, 42 C.M.R. 4 (C.M.A. 1970) (holding wrongful appropriation of "personal property" too vague).

B. *United States v. Alcantara*, 40 C.M.R. 84 (C.M.A. 1969) (holding larceny of "foodstuffs" sufficient).

C. *United States v. Weems*, 13 M.J. 609 (A.F.C.M.R. 1982) (holding larceny of "three unknown items" was vague but sufficient to protect the accused from re-prosecution for any three items on that date).

D. *United States v. Durham*, 21 M.J. 232 (C.M.A. 1986) (holding stolen property sufficiently identified in record to protect from a second prosecution; not fatally defective).

E. *United States v. Peszynski*, 40 M.J. 874 (N.M.C.M.R. 1994)(setting aside conviction on ground that conduct popularly styled sexual harassment did not state an offense).

IV. Bill of Particulars. R.C.M. 906(b)(6).

Motion to compel the government to inform the accused of the precise misconduct alleged in the specification. *See, e.g., United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990).

APPENDIX B: PLEADING NON-CAPITAL FEDERAL CRIMES UNDER ARTICLE 134, CLAUSE 3

CHARGE: VIOLATION OF THE UNIFORM CODE OF MILITARY JUSTICE, ART. 134.

[Violation of U.S. Code]

Specification: In that SGT John Jones, U.S. Army, did, at Fort Bragg, North Carolina, a military installation within the special maritime and territorial jurisdiction of the United States, between on or about 1 October 2003 and 30 November 2003, unlawfully bring into the United States a firearm he obtained while deployed to Iraq during Operation Iraqi Freedom, to wit: a folding-stock AK-47 assault rifle with bayonet, in violation of 26 U.S.C. §5844, [such conduct being prejudicial to good order and discipline in the armed forces].

[Assimilated State Law]

Specification: In that SPC Joseph Jones, U.S. Army, did, at Fort Hood, Texas, a military installation within the special maritime and territorial jurisdiction of the United States, on or about 4 February 2004, unlawfully enter a 2001 Honda Accord automobile, the property of SSG John M. Smith, with intent to commit a criminal offense therein, to wit: larceny of one car radio, in violation of §30.04 of the Texas Penal Code, and 18 U.S.C. §13, [such conduct being prejudicial to good order and discipline in the armed forces].

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APPENDIX C: RECENT UCMJ AMENDMENTS

I. ARTICLE 43, UCMJ—STATUTE OF LIMITATIONS.

A. Amended by the DoD Authorization Act for Fiscal Year 2004, 24 Nov 03.

B. Provides extended limitations period for "child abuse" offenses.

1. Art. 120, rape and carnal knowledge.

2. Art. 124, maiming.

3. Art. 125, sodomy. The amendment reads, "Sodomy in violation of section 925 of this title (article 126)." Clearly, this is a typographical error.

4. Art. 128, aggravated assault or battery. Simple assault is not included.

5. Art. 134, assault with intent to commit murder, voluntary manslaughter, rape, or sodomy.

6. Art. 134, indecent assault.

7. Art. 134, indecent acts or liberties with a child.

C. SPCMCA must receive charges NLT victim's 25th birthday.

D. Retroactivity. Application to acts committed before 24 Nov 03.

1. Amendment does not address.

2. *Ex Post Facto Clause* precludes application if previous limitations period expired. *Stogner v. California*, 539 U.S. 607, 123 S. Ct. 2446 (2003).

3. May extend limitations period that had not expired on 24 Nov 03. *See Stogner*, 123 S. Ct. at 2453.

II. ARTICLE 111—DRUNKEN OR RECKLESS OPERATION.

A. Amended by the DoD Authorization Act for Fiscal Year 2004, 24 Nov 03.

B. Punishes blood alcohol content (BAC) "equal to or exceeding" applicable limit.

C. BAC limit in U.S. is the lesser of:

1. State law BAC limit.

2. 0.10 grams alcohol per 100 mL blood or 210 L breath.

D. "BAC limit" definition slightly modified.

E. References to "maximum" BAC limit eliminated.

III. ARTICLE 119A—DEATH OF INJURY TO UNBORN CHILD (CREATED 1 APR 04).

A. Created by the Unborn Victims of Violence Act of 2004 (Laci and Connor's Law), 1 Apr 04.

B. Provides separate punishment for death/injury to an unborn child caused by the following offenses against the mother:

1. Art. 118, murder.

2. Art. 119(a), voluntary manslaughter.

3. Art. 119(b)(2), involuntary manslaughter during commission of offense directly affecting the person of the victim ("misdemeanor manslaughter"). This does not include Art. 119(b)(1), involuntary manslaughter by culpable negligence.

4. Art. 120(a), rape.

5. Art. 124, maiming.

6. Art. 126, arson.

7. Art. 128, assault.

C. "Unborn child." A member of the species *homo sapiens*, at any stage of development, who is carried in the womb.

D. *Mens rea*. Art. 119a does not require proof of:

1. Knowledge, or negligent lack of knowledge, regarding pregnancy of victim of underlying offense.

2. Intent to kill or injure unborn child.

3. Any *mens rea* beyond that required for underlying offense.

4. But, attempted or intentional killing of unborn child punished under Arts. 80, 118, 119(a), not under Art. 119a.

E. Exemptions. Art. 119a does not cover:

1. Consensual abortion of unborn child.

2. Medical treatment of mother or unborn child.

3. Death or injury caused by unborn child's mother.

F. Punishment.

1. "Consistent with" conduct causing the same injury or death to mother.

2. Death penalty not authorized.

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